XI-HC—78

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उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

मामला क्रमांक Cr. App. 2860/99 सन् 200

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No.2860/1999

APPELLANTS

1 Vijay, aged about 27 years son of Shri Tikaram Kaushik

2 Santoshi Bai, aged 23 years w/o Devnandan Kaushik

Both residents of Gram Bundela, Thana- Chakarbhata, District Bilaspur(CG)

Versus

RESPONDENT

State of Madhya Pradesh (now Chhattisgarh), Through Police Station- Chakarbhata, District Bilaspur (CG)

DB: HON'BLE SHRI JUSTICE L.C. BHADOO & HON'BLE SHRI JUSTICE SUNIL KUMAR SINHA, JJ.

Appearance:

Shri Abhay Tiwari, Counsel for the appellants.

Shri U.K.S.Chandel, Panel Lawyer for the State.

ORAL JUDGMENT

(02.11.2007)

L.C. BHADOO, J.

Heard.

This appeal is directed against the judgment of conviction and order of sentence dated 24.2.1999, passed by the Special

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Judge, (FTC), Bilaspur in Sessions Trial No. 534/1997, whereby and where-under, the learned Special Judge, after holding the accused/appellant- Vijay guilty for commission of the offence punishable under Sections 302 & 201 of IPC for committing murder of Devnandan, sentenced him to undergo imprisonment for life and R.I. for 3 years respectively. He also convicted Santoshi Bai for commission of the offence punishable under Section 302 read with Section 34 of IPC and sentenced her to undergo imprisonment for life for committing murder of Devnandan, her husband. It was further directed that both the sentences of Vijay shall run concurrently. However, he acquitted the accused persons- Ajay Kumar, Prabha Bai w/o Ajay Kumar, Brihaspati Bai w/o Tikaram, who is mother of Vijay, Osanti Bai w/o Vijay for commission of the offence punishable under Section 201 of IPC.

The case of the prosecution in brief is that on 5.7.1997 in between 7 and 8 p.m., Devnandan (since deceased), husband of Santoshi Bai returned to his house and saw that the accused/appellant- Vijay was hiding himself in his house, on which, Devnandan asked him as to what he is doing there. The accused/appellant- Vijay thought that illicit relationship between him and Santoshi Bai, wife of Devnandan shall come in to light, therefore, he attacked Devnandan by pressing his neck, somehow, Devnandan was able to release himself from the clutches of Vijay and scuffle started between the two. In that

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process, Vijay threw Devnandan on the cot and sat on his chest, started pressing his neck, whereas, Santoshi Bai was holding the legs of her husband-Devnandan, so that, he may not be able to release himself from the clutches of Vijay. Ultimately, on account of pressing the neck of Devnandan by Vijay, he died spontaneously. After digging a pit, body of Devnandan was buried in the house of Devnandan and the site was covered by paddy straw by both the accused/appellants. A missing report was lodged in the Police Station on 7.7.1997 by PW-5 – Lomash, brother of the deceased. Thereafter, accused- Vijay, Santoshi Bai, Ajay Kumar, Prabha Bai, Osanti Bai and Brihaspati Bai, shifted the body of Devnandan to Vijay house and that was buried in the house of Vijay. During enquiry, accused/appellant- Vijay gave memorandum Ex.P/8 regarding the place, where the body of Devnandan was buried. In pursuance of that he got recovered the body of Devnandan from his house under Ex. P/16 in presence of PW-6 – Srikumar Lahre as also in the presence of PW-9- Dr. B.D. Sonwani, based on that merg intimation under Exs.P/13 & P/14 was recorded. F.I.R. under Exs. P/11 & P/12 was registered. Body of Devnandan was sent for postmortem examination under Ex. P/11 to Primary Health Centre, Chakarbhata, where Dr. B.D. Sonwani(PW-9) and Dr. H.P.Gupta (PW-11) conducted the postmortem on 11.7.1997 and opined that the cause of death was asphyxia due to throttling. The spade with which, the pit was dug and shirt of the accused were seized

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under Exs.P/5 & P/6. Inquest under Ex.P/7 on the body of Devnandan was prepared.

After completion of the investigation, charge sheet was filed against the accused persons in the Court of J.M.F.C. Bilaspur, who in turn committed the case to the Sessions Judge, Bilaspur from where, the learned Special Judge received the case on transfer for trial.

The prosecution in order to establish the charge against the accused persons examined 11 witnesses. The statement of the accused persons was recorded under Section 313 of the Code of Criminal Procedure, in which, each of the accused denied the material appearing against them and stated that they are innocent and have been falsely implicated in the crime.

The learned Special Judge, after hearing the counsel for respective parties convicted and sentenced the accused/ appellants as aforementioned.

We have heard Shri Abhay Tiwari, learned counsel for the appellants and Shri U.K.S. Chandel, Panel Lawyer for the State.

Shri Abhay Tiwari has not disputed the homicidal death of Devnandan. Moreover, PW-1- Ku. Anjani, daughter of the deceased and the accused/appellant- Santoshi Bai, has categorically stated that in the fateful night, accused/appellant-Vijay throttled his father, whereas co-accused- Santoshi (her mother) was holding the legs of her father. PW-9 – Dr. B.D. Sonwami has stated that on 11.7.1997, at about 12.30 noon, he

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conducted the postmortem on the body of Devnandan and found that the body was putrefied and stinking. There was injury on left cheek and neck of the deceased. Tongue was protruded and the same was between the teeth. Skin was peeled off and the body was in swollen condition. He has further stated that there was injury in the form of bruise on the neck, cheek and chest and those were anti-mortem in nature. Hyoid bone was fractured. The cause of death was asphyxia due to throttling. His report is Ex. P/11. Therefore, from the above ocular and medical evidence, it is established that the death Devnandan was homicidal in nature.

As far as complicity of the accused persons in crime in question is concerned, Shri Abhay Tiwari argued that allegations against Santoshi Bai are that she was holding the legs of the deceased, therefore, from the evidence available on record, it cannot be held that she was sharing intention with the accused/appellant-Vijay to commit murder of Devnandan, who is her husband. In this case, the sole witness is PW-1- Ku. Anjani, aged about 8 years, daughter of the deceased and the accused/appellant-Santoshi Bai, who has stated that at about 8.00 pm, on the fateful evening, the accused/appellant, her mother and uncle-Vijay were at her residence along with she and her younger brother and sister. At that time, her father returned to house and asked her mother to prepare tea, which was refused by her mother, therefore, her father took turn for bringing wood.

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In the meantime, accused/appellant- Vijay caught her father from the neck, pressed his neck and threw him on the ground. Her mother immediately held the legs of her father and after some time her father died. Thereafter, Vijay brought *Kudari.* Vijay and her mother took the body in the *Kothar* (a place meant for tying the cattle) and buried the body there.

Shri Tiwari argued that she is a child witness. Moreover, her police statement was recorded on 11.7.1997. She is a cooked up witness, therefore, no reliance can be placed on the evidence of this witness.

It is true that she is a child witness. The law relating to acceptability of the evidence of a child witness is that the child witness must the competent and she may not be subject to tutoring, therefore, before accepting the evidence, the Court is required to scrutinize the evidence with care in order to ascertain that the child witness was capable of understanding and shall also give answer after understanding the question and she or he was not subject to tutoring. As far as the delay in recording the statement of Ku. Anjani is concerned, in para 9 of her evidence, she has categorically stated that Vijay threatened her not to disclose this fact to anybody, otherwise he will kill her.

It is an admitted position that the child witness was residing with her mother- Santoshi Bai, who was also a party to the crime; therefore, on account of threat given to her, she could not disclose this fact to anybody. It was natural for her to keep

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mum and not to open her mouth. The heinous crime was committed in her presence and in that crime, not only Vijay, her uncle, but her mother also participated, therefore, the delay has been explained and that too in a justified manner.

Now coming to the dependability of the evidence of this witness, evidence of this witness is corroborated in material particulars on account of the fact that Santoshi Bai, mother of the child was having illicit relationship with the co-accused-Vijay, cousin brother of the deceased, who was residing in her adjoining house. Illicit relationship between Vijay and Santoshi Bai has been established by the prosecution adducing the evidence of PW-2- Rajesh Kumar Kaushik and PW-7- Lakhanlal, who have stated about the illicit relationship between the two. Moreover, the body of Devnandan was exhumed at the instance of the accused/appellant-Vijay from his house, that has been established by the evidence of PW-10- Dilip Mitra as also PW-6-Srikumar Lahre and PW-9 – Dr. B.D.Sonwani.

In the cross-examination the defence has not been able to elicit any circumstance, which discredits the evidence of these witnesses. Therefore, from the ocular evidence of PW-1- Ku. Anjani, daughter of the deceased and the accused/appellant-Santoshi Bai as also recovery of the body of Devnandan at the instance of accused/appellant-Vijay from his house from a pit. Motive behind the crime was that Vijay and Santoshi Bai were having illicit relationship since last 2 years. On the fateful day,

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when the deceased returned to his house that made the accused/appellant-Vijay suspicious and he became frightened that now everything will be disclosed about his relationship with Santoshi Bai because prior to that Devnandan convened a Panchayat in the village and stated that he will not keep Santoshi Bai, as she is having illicit relationship with Vijay, but the villagers persuaded Devnandan that he is having children, therefore, he should keep Santoshi Bai. Even Santoshi was also persuaded saying that she is a lady, having children; she should not indulge in such affairs. This fact has been proved by the statement of PW-7- Lakhan, therefore, from the material appearing on record; motive for commission of the crime has been established. Moreover, the eye-witness is the minor daughter of the deceased-Devnandan and accused/appellant-Santoshi Bai. The body of the deceased was exhumed at the instance of the accused/appellant Vijay from his house, therefore, to this extent, complicity of the accused/appellant-Vijay and Santoshi Bai in the crime is established beyond reasonable doubts and sufficient material has been brought on record by the prosecution.

Now coming to the arguments of Shri Tiwari that as far as the act of Santoshi bai is concerned, it cannot be attributed to her that she was sharing intention with Vijay to commit murder of Devnandan, in order to appreciate the arguments advanced by learned counsel, we have carefully scrutinized the evidence of

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PW-1- Ku. Anjani, who witnessed the incident as also the medical evidence of Dr. B.D.Sonwani(PW-9) coupled with postmortem report, Ex. P/11. PW-1-Ku. Anjani has stated that accused/appellant- Vijay after holding her father by neck, threw him on the ground and started pressing his neck and her mother held the legs of her father. No doubt, this act of the accused/appellant- Santoshi Bai facilitated the crime because by that act, deceased was not able to move and get him released from the clutches of Vijay. Her intention can also be gathered from the fact that she was having illicit relationship with Vijay for quite some time and when her husband-Devnandan saw Vijay in his house in hiding condition, both Vijay and Santoshi Bai became suspicious and frightened that now their relationship will come to light in the village, as prior to that the deceased had already convened a village Panchayat regarding illicit relationship between Vijay and Santoshi Bai, therefore, for all practical reasons, Santoshi Bai decided to assist Vijay in commission of murder of her husband. As per the medical evidence, when Vijay assaulted Devnandan, even his hyoid bone was fractured. After commission of the crime, accused/appellant – Santoshi Bai along with co-accused- Vijay took the body and buried the same in the *Kothar* by digging a pit.

It is established law that the common intention can be formed at the spot at the time of commission of the crime also. When

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Vijay was pressing the neck of the deceased, the deceased was trying to release himself from the clutches of the accused, therefore, to facilitate the crime, accused/appellant-Santoshi Bai held the legs of the deceased-Devandan (her husband) to make him helpless, motionless and that in turn helped the accused/appellant- Vijay to press the neck of the deceased and thereby he committed the murder of Devnandan by pressing the neck. Therefore, from the previous conduct and during commission of the crime, conduct of Santoshi Bai established her intention that she was sharing intention with accused/appellant-Vijay for commission of murder of Devnandan.

Looking to the above facts, we are of the considered opinion that both the accused persons have been rightly convicted under Section 302, 302/34 of IPC. We do not find any illegality or infirmity in the judgment of the trial Court. The appeal being devoid merits, liable to be dismissed and it is accordingly, dismissed.

Sd/-
L.C.BHADOO
Judge

Sd/-
SUNIL KUMAR SINHA
Judge

sunita